IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1956.

No. 42

JOHN W. WEBB,

Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit.

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT
ADDITIONAL MATERIAL FACTS

At the time the Petitioner observed the grain leaking, he was standing about 20 feet south of the house track switch (R. 13). He took one step and stepped on the cinder or clinker and fell. He did not see the cinder or clinker, that was by his guess about the size of his fist, before he took the step although he had occasion to look at the ground (R. 14). He never noticed whether the clinker was on top of the roadbed before he made this step. When he first saw the cinder after the accident it was out of the ground or partially out of the ground (R. 15). The parties stipulated (Deft's Ex. I; R. 45, 112) and the Petitioner testified that Defendant's Exhibit I substantially represented the conditions as they existed at that locale (R. 58).

Prior to the accident and practically every day the Petitioner had occasion to pass over the house track switch. He was familiar with the footing conditions around this switch (R. 58). The petitioner stated that the area in question was used by the firemen to clean fire boxes at Mount Olive, but that any clinkers he saw were out of his way (R. 59). He admitted that at the time of the taking of his deposition on November 4, 1954, he stated that he had never noticed large cinders near the house track switch on previous trips prior to July 2, 1952. On the day of the accident he noticed no other large cinders around the house track switch other than the one he stepped on. He did not know when the cinder was placed there or who placed it there (R. 62).

The ballast used to repair the house track switch consisted of chat or cinders, the largest being about 2" in diameter (R. 73). These repairs were made in the latter part of March, 1952, and no work was done in that area between that time and July 2, 1952 (R. 72). Respondent's Section Foreman Lester Rector inspected the house track switch semi-weekly for bad footing or objects that might be laying around (R. 74).

Oelrich, Respondent's Track Inspector, at times made a walking inspection of the roadbed along side of the house track switch (R. 81). Brasnahan, respondent's Track Supervisor, testified that on some, but not all, occasions he would stop at the house track switch to inspect the ballast (R. 85).

ARGUMENT

POINT I

THE OPINION OF THE COURT OF APPEALS DOES NOT STAND FOR THE PROPOSITION THAT PETITIONER MUST NEGATE INFERENCES OF NEGLIGENCE OF PERSONS OTHER THAN THE RESPONDENT.

In the heading of Point I of petitioner's argument, he contends that a plaintiff need not negate inferences of negligence of third persons in order to recover under the Federal Employers' Liability Act. The respondent has no quarrel with that proposition and, in fact, will concede the correctness of such a statement, so far as it goes. Undoubtedly the reason for such inclusion in the petitioner's argument is because of the petitioner's belief that the Court of Appeals in its decision in the instant case held that a plaintiff must negate such inferences.

The respondent cannot concede the correctness of this belief and instead contends that in reaching such a conclusion, the petitioner has misconstrued or misinterpreted the decision.

The reading of the opinion clearly discloses that in reaching this decision, the Court of Appeals applied well established and accepted principles of negligence law as they apply to cases arising under the Federal Employers' Liability Act.

In the case at bar, fundamentally a common law negligence action, with certain modifications of that law Congress has seen fit to impose by the provisions of the Act, the petitioner had the burden of proving certain negligent acts or omissions on the part of the respondent. The

Court of Appeals merely held that the petitioner, in order to make a submissible case, had the burden to adduce substantial evidence that the respondent either negligently placed the clinker or was chargeable with notice, either actual or constructive, of its presence.

This Court has recognized such a requirement in the case strongly relied upon by petitioner in Point I of his argument, *viz. Tennant* v. *Peoria & Pekin U. Ry. Co.*, 321 U.S. 29 (1944). This court, speaking through Mr. Justice Murphy, said at page 32:

> "In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, 67. Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred."

In the absence, therefore, in the trial court record, of the requisite probative facts from which the negligence of the respondent could reasonably be inferred, the Court of Appeals held, and rightfully so, that the petitioner had failed to sustain his burden and that a verdict should have been directed for the defendant.

Again in Point I of the petitioner's argument (P. 10), the petitioner contends that the Court of Appeals in the instant case had no right to weigh evidence; that to do so would usurp the function of the jury. In the case of *Brady* v. *Southern Railway Co.*, 320 U.S. 476 (1943) this Court said at pages 479-480:

> "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. *Western & Atlantic R. Co.* v. *Hughes, supra; Baltimore & Ohio R. Co.* v. *Groeger*, 266 U.S. 521, 524, *Cf. Gunning* v. *Cooley*, 281 U.S. 90, 94; *Commissioners* v. *Clark*, 94 U.S. 278, 284. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the Court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

The decision of the Court of Appeals was not arrived at by searching the record for conflicting circumstantial evidence, with the court weighing such evidence and substituting its judgment for that of the jury; it was arrived at through the failure of petitioner to present sufficient probative facts from which the negligence of the respondent could reasonably be inferred, as required by *Tennant* v. *Peoria & Pekin U. Ry. Co.*, 321 U.S. 29 (1944).

To the extent that the petitioner argues, if such be the case, that the fact of injury alone plus the possibility of negligence on the part of the defendant, unsupported by probative facts in the record from which such negligence can reasonably be inferred, requires submission of the case to a jury, this respondent will categorically state that it has never found a case standing for such a proposition nor does the petitioner cite such a case in his brief.

In *Tennant* v. *Peoria & Pekin U. Ry. Co.*, 321 U.S. 29 (1944), the sufficiency of the evidence of negligence of the respondent therein was apparently not even before this

Court. The fact is, the opinion of this Court indicates that the lower court therein had found there was evidence of negligence by the carrier and this Court held at page 33:

> "As to the proof of negligence, the court below correctly held that it was sufficient to present a jury question."

Nor is such a result startling in view of the fact that there was evidence that a rule of the defendant required a train bell to be rung prior to an engine movement, but that the train crew failed to ring the engine bell prior to the movement that resulted in fatal injuries to Tennant. In the presence of such evidence this court held that notwithstanding contradictory evidence the question of whether this act or some other acts caused the injury should be determined by the jury.

In *Lavender* v. *Kurn*, 327 U.S. 645 (1945), this Court held that the record contained probative facts from which the jury could infer that the injuries were caused by a mail hook dangling from a train of one of the defendants therein; even the Supreme Court of Missouri admitted that such an inference could be drawn.

The respondent is unable to ascertain how the decisions of *Myers* v. *Reading R. Co.*, 331 U.S. 477 (1947) and *Spotts* v. *Baltimore & O. R. Co.*, 102 F. 2nd 160 (7th Cir.—1939), cited in Point I of the petitioner's argument, are in any way applicable to the instant case. Both of these cases were brought under the provisions of the Safety Appliance Acts, 45 U.S.C., Section 11. This court has held that in such cases the duty imposed on a carrier by the railroad engaged in Interstate commerce to provide "efficient" hand brakes is an absolute one. Negligence plays no part in the trial of such suits. Both cases establish the rule that the

testimony of the plaintiff alone that the brake failed to work efficiently was a fact sufficiently probative to support a jury verdict against the carrier.

In the remaining two cases discussed by the petitioner under Point I in his brief, namely, *Stanczek* v. *Pennsylvania R. Co.*, 174 F 2nd 43 (7th Cir.—1949) and *Henwood* v. *Coburn*, 165 F 2nd 418 (8th Cir.—1948), it was apparent that the evidence presented in the trial court contained sufficient probative facts from which an inference of negligence on the part of the defendants therein could reasonably be drawn by the jury.

In Point II of the petitioner's argument, he has cited a number of decisions by this Court, and other courts, construing the Federal Employers' Liability Act and suits brought thereunder. Most of these cases were submitted by the petitioner for the consideration of the Court of Appeals in either his brief and argument or his petition for re-hearing before that court. It was pointed out by the respondent at that time and it is strenuously urged here that in each of these cases there was presented sufficient probative facts from which the jury could reasonably infer negligence on the part of the carrier.

The most recent decision of this Court cited by the petitioner in Point II of his argument is that of *Schultz, Administrator* v. *Pennsylvania R. Co.*, 350 U.S. 523 (1956). The opinion of this Court indicates that in that case the district judge conceded there was some evidence of negligence on the part of the defendant and this Court concluded that from the facts presented, fair-minded men could find the defendant negligent in requiring the petitioner's intestate to work on dark, icy and undermanned boats of the respondent therein. Surely, in the absence of such probative facts pointing to the negligence of the defendant, it

would have been the court's duty to take the case from the jury and direct a verdict for the defendant in accordance with the mandate laid down by this court in *Brady* v. *Southern Ry. Co.*, 320 U.S. 426 (1943).

The court below, in the instant case, after a very careful and exhaustive review of the record in this case concluded in an unanimous opinion, that the petitioner had failed to sustain his burden; that the fact that a speculative possibility existed that this respondent, along with countless other agencies, might have been responsible for the presence of the clinker, did not satisfy the evidentiary requirements laid down by this court for submitting such a case to a jury; that a speculative possibility does not supply the place of proof.

Obviously this decision by the Court of Appeals does not hold that a plaintiff must negate all possible inferences of negligence of persons other than the defendant.

The decision of the Court of Appeals in the instant case is not unlike the decision of this Court in the case of *Gulf, Mobile & Northern R.R. Co.* v. *Wells*, 275 U.S. 455 (1928). In that case an employee brakeman charged the defendant carrier with negligence, through its engineer, in giving a sudden unnecessary jerk to the train while the employee was attempting to board it, causing him to be thrown to the ground. The plaintiff testified that as he grabbed the grab iron, he stepped on a big piece of coal—his foot turned and as he went down the engine gave an unusual jerk which threw him loose of the train. The engineer and other members of the crew testified for the defendant that the train was started in the ordinary way and that at the time of injury there was in fact no unusual jerk or lurch of the train.

From a verdict and judgment in favor of the plaintiff, affirmed by the Supreme Court of the State, a writ of certiorari was granted by this Court on petition of defendant. The plaintiff argued that the question of the engineer's negligence was properly a jury question because of an inference that could be drawn from the plaintiff's own statement that the engine gave an unusual jerk. In reversing the judgment, the Court charged that such an inference could not be drawn, as there was no evidence that the engineer knew or should have known that the plaintiff was in a position in which a jerk of the train would be dangerous to him; that plaintiff's opinion that the jerk was unusual and severe had no substantial weight, considering his physical situation by the side of the train at the time of the alleged jerk.

This Court said on page 372:

> "In short, we find that on the evidence and all the inferences which the jury might reasonably draw therefrom taken most strongly against the railway company, the contention that the injury was caused by the negligence of the engineer is without any substantial support. In no aspect does the record do more than leave the matter in the realm of speculation and conjecture. That is not enough." (Citing cases.)

In *Hawkins* v. *Clinchfield R. Co.*, 266 SW 2nd 840 (Ct. App. Tenn.—1953) suit was brought under the Federal Employers' Liability Act when the plaintiff, a yard brakeman, stepped off an engine onto a nail which penetrated his foot. The board which held the nail, being covered with grass and weeds, was concealed and invisible. The defendant was charged with negligence in failing to provide the employee with a safe place to work. In affirming a directed verdict for the defendant, the Court of Appeals said on page 841:

"According to the plaintiff's testimony he did not see the board which held the nail, and there was no evidence that it could have been seen by the defendant by the exercise of reasonable care. Nor was there evidence that the defendant had knowledge of its existence, or how long it had been there. Under these circumstances it could not have been reasonably foreseen by the defendant that the nail would cause injury to one of its employees. Therefore, in the absence of proof of actionable negligence on the part of the defendant, we think that the court properly granted a new trial and directed a verdict for the defendant.

"Furthermore, under the Act, the presumption prevails that the defendant was not aware of the existence of the nail, and, until it was shown that the defendant knew or by the exercise of ordinary care should have known of it, the defendant would not be charged with such knowledge." (Citing cases.)

In *Patton* v. *Texas & Pacific Ry. Co.*, 179 U.S. 658 (1900), the plaintiff, a railroad fireman, brought suit against his employer, alleging negligence in the failure to have an engine step securely fastened which resulted in his sustaining injuries as the step turned when he attempted to step off the engine.

In affirming a directed verdict for the defendant, this Court pointed out, after summarizing the testimony in the case, that it was impossible to tell how the step became loosened; that this may have occurred from the ordinary working of the engine or because the step struck something or because large lumps of coal may have dropped on the step.

Another possibility was that an employee of the defendant failed to properly fasten the step shortly before the accident.

This court concluded that on the record it was a mere matter of conjecture as to how the step became loose.

The following language is found on page 663-664:

> "• • • The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. *Texas & Pacific Railway* v. *Barrett*, 166 U.S. 617. Second. That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

Petitioner on page 9 of his Brief on the Merits contends that the Court of Appeals erred when it used the following language:

> "• • • There are no probabilities to be deduced from this evidence. That defendant placed the clinker in its roadbed as a part of the ballast used in the repair operation is merely one of several possibilities present. A finding that it did so can rest on nothing but speculation."

Webb v. *Illinois Central Railroad Company*, 228 F. 2nd 257 at page 259.

There have been numerous cases decided by both this Court and lower courts that stand for the proposition that verdicts must rest on reasonable probabilities, not speculative possibilities. This rule is applicable both as to the question of negligence and as to the question of causation.

See *United States* v. *Crume*, 54 F. 2nd 556 (CCA 5—1931) where the court said at page 558:

> "'Verdicts must rest on probabilities, not on bare possibilities. There is not capacity in any number of the former to create the latter. So the person on whom the burden of proof rests to establish the right of a controversy, must produce credible evidence from which men of unbiased minds can reasonably decide in his favor. He cannot leave the right of the matter to rest in mere conjecture and expect to succeed. * * * The doctrine of those cases condemns the grounding of a verdict upon such shadowy proof as not to establish the vital facts to a reasonable certainty.' *Samulski* v. *Menasha Paper Co.*, 147 Wis. 285, 133 N.W. 142, 145."

Also, in the case of *Henry H. Cross Co.* v. *Simmons*, 96 F. 2nd 482 (CCA 8th—1938), the Court held that it was improper to submit to a jury a choice of possibilities, saying at page 486:

> "To submit to a jury a choice of possibilities is but to permit the jury to conjecture or guess, and where the evidence presents no more than such choice it is not substantial, and where proven facts give equal support to each of two inconsistent inferences, neither of them can be said to be established by substantial evidence and judgment must go against the party upon whom rests the burden of sustaining one of the inferences as against the other. *Pennsylvania R. Co.* v. *Chamberlain*, 288 U.S. 333, 53 S. Ct. 391, 77 L. Ed. 819; *Liggett & Meyers Tobacco Co.* v. *De Parcq*, 8 Cir., 66 F. 2nd 678; *Eggen* v. *United States*, 8 Cir., 58 F. 2nd 616; *Fidelity & Deposit Co.* v. *Grand National Bank*, 8 Cir., 69 F. 2nd 177. The impossibility of proof

> of material facts, while a misfortune, does not change rules of evidence, but leaves the one having the burden of proof with a claim that is unenforceable. *Burnet* v. *Houston*, 283 U.S. 223, 51 S. Ct. 413, 75 L. Ed. 991."

Verdicts must rest on probabilities, not on bare possibilities. *New York Life Ins. Co.* v. *Trimble*, 69 F. 2nd 849, 850 (CCA 5th—1934); *Love* v. *New York Life Ins. Co.*, 64 F. 2nd 829, 832 (CCA 5th—1933).

Other cases holding that before an issue can be submitted to a jury either as to negligence or as to causation, the facts presented must be in the area of reasonable "probability" rather than speculative possibility are the cases of: *A. T. & S. F. Ry. Co.* v. *Toops*, 281 U.S. 351 (1930); *McDermott* v. *Minneapolis, N. & S. Ry. Co.*, 283 N.W. 116 (Supr. Ct. Minn.—1938); *Fort Worth & Denver City Ry. Co.* v. *Smith*, 206 F. 2nd 667 (5th Cir. 1953); and *Devine v. Southern Pacific Company*, 295 P. 2nd 201 (Supr. Ct. Ore.—1956).

In the last cited case the Supreme Court of Oregon said at page 203:

> "We have often stated that an issue of fact may be submitted to a jury only when the proof shows reasonable certainty as opposed to 'a finding dependent upon conjecture and speculation,' and that mere possibility, alone, of a causal relation between an injury and a physical result are insufficient to lift the case out of the area of conjecture and speculation. *Henderson* v. *Union P. R. R. Co.*, 189 Or. 145, 160, 219 P. 2d 170."

It is submitted that where, as here, the evidence produced by the plaintiff presented merely one of several speculative possibilities, not supported by substantial evidence in the record, the court below properly reversed the judgment for the plaintiff in the trial court and ordered a finding for the defendant. When such a situation exists the court does not usurp the functions of the jury.

POINT II.

THE COURT OF APPEALS DID NOT INVADE THE PROVINCE OF THE JURY BY SETTING ASIDE THE PETITIONER'S VERDICT AND JUDGMENT, AND DIRECTING ENTRY OF JUDGMENT FOR THE RESPONDENT.

Petitioner presents the following question to this Court for review in question II:

> "Does a Court of Appeals invade the province of a jury and violate the scope of appellate review in a Federal Employers' Liability Act case by setting aside an employee's jury verdict and judgment and directing entry of final judgment for the railroad when the record shows that:
>
> > "The Employee stepped on a large clinker buried near a switch stand in a soft, new roadbed constructed by the railroad about three weeks before the accident; the railroad's firemen cleaned their fireboxes at this location; the employee's duties required him to work on the ground at this point and the employee and the employer's witnesses testified that a clinker as described made for bad footing and an unsafe place to work?"

It is assumed that the excerpts allegedly found in the trial record and contained in his question are what he contends constitute the facts sufficient to sustain his verdict in the trial court. It cannot be denied that any testimony as to footing conditions or the relative safeness of the place to work is wholly immaterial unless sufficient probative facts are presented from which the negligence of the employer in creating this condition can reasonably be inferred.

Respondent does not deny that petitioner's duties required him to work at the place in question, but again this fact is of no value whatsoever in determining whether or not the respondent was guilty of any negligent act or

omission. Likewise, giving every inference to petitioner's bald assertion, without elaboration, in the trial record that firemen cleaned their fire boxes at this location, any inferences of negligence of the respondent to be drawn from such a statement is completely nullified by petitioner's admission that on the day of the accident he noticed only the one clinker and that he had *never* noticed large cinders near the house track switch prior to July 2, 1952 (R. 60).

The remaining conclusion drawn by the petitioner from the trial record and set forth in his question II is that he stepped on a clinker buried near the switch stand in the new roadbed constructed by the respondent about three weeks before the accident. In proceeding on the theory that the cinder or clinker was buried, it is apparent that the petitioner placed greater weight on his unsworn statement than on his sworn testimony on the witness stand. Under oath, he testified he never noticed whether or not the clinker was on top of the roadbed before he made his step (R. 15); that when he started to turn he stepped *on* a cinder or clinker and fell (R. 14) and that when he first saw the object after his fall, it was out of the ground or partially so (R. 15).

The comments of the trial judge during cross-examination of the petitioner would likewise seem to refute plaintiff's present contention that the cinder or clinker was buried (R. 60-61).

The record in this case reveals no affirmative evidence as to how or when the clinker got onto the right of way at the point where the accident happened. There is no dispute that the cinder or clinker had never been seen prior to July 2, 1952 either by the petitioner, who was over the area in question practically every day, or by any of the

employees of the respondent charged with the responsibility of maintaining the site in question free from objects foreign to a roadbed. It can hardly be denied that it will never be known when and by what agency the cinder became placed in the position where the accident occurred.

Granted, a wholly speculative possibility exists, unsupported by probative evidence in the record, that the cinder in question had been on the premises of the respondent thru an act of the respondent or for a period of time sufficient to charge the respondent with constructive notice of its presence. Likewise, as forcibly pointed out by the Court of Appeals of the Seventh Circuit, there are countless other speculative possibilities also present, that the presence of the cinder was attributable to agencies over which this respondent had no control. No case found by this respondent has ever held that such a speculative possibility can substitute for the burden placed on the petitioner to introduce into evidence probative facts from which the negligence of the respondent can be inferred by a jury. To infer negligence on the part of the respondent upon the meager facts presented in the record could only be grounded upon speculation, pure and simple. As this court stated in *Moore* v. *Chesapeake & O. Ry. Co.*, 340 U.S. 573 at 578:

> "Speculation cannot supply the place of proof. *Galloway* v. *U. S.*, 319 U.S. 372, 395."

It is submitted that where there are no probative facts from which the negligence of the respondent can reasonably be inferred, the Court of Appeals does not invade the province of a jury and violate the scope of appellate review by setting aside the petitioner's verdict and judgment and directing entry of judgment for the respondent. This Court in the case of *Eckenrode, Adm.* v. *Pennsylvania R. Co.*, 335 U.S. 329 (1948), in affirming an order of the U. S.

Court of Appeals for the third circuit directing a judgment for the defendant said, page 330:

> "There is a single question presented to us: Was there any evidence in the record upon which the jury could have found negligence on the part of the respondent which contributed, in whole or in part, to Eckenrode's death? Upon consideration of the record, the Court is of the opinion that there is no evidence, nor any inference which reasonably may be drawn from the evidence when viewed in a light most favorable to the petitioner, which can sustain a recovery for her."

This respondent respectfully says that there is no evidence in this record upon which the jury could have found negligence on the part of the respondent which contributed in whole, or in part, to the petitioner's injuries.

POINT III.

IT WAS INCUMBENT ON PLAINTIFF TO ADDUCE EVIDENCE THAT THE DEFENDANT KNEW OR, IN THE EXERCISE OF REASONABLE CARE, SHOULD HAVE KNOWN OF THE PRESENCE OF THE CINDER.

Point III of petitioner's Brief on the Merits raises the question as to whether or not plaintiff was obligated to prove notice of a defective condition created by respondent in its own roadbed.

As clearly pointed out by the Court of Appeals, the presence of the object referred to by plaintiff is not negligence *per se*. There was no evidence from which a jury could reasonably conclude that the procedure followed in improving its roadbed was not usual and customary, or that any other methods are used by any railroad in the construction of their roadbed. The extracts from the record quoted by petitioner in his brief (pp. 23-24), far from proving negligence, on the contrary only goes to show the extreme watchfulness and care exercised by respondent. The record fails to sustain petitioner's burden to adduce probative facts that the defendant "carelessly"

allowed a cinder six inches in circumference to be placed in its roadbed. The mere presence of a single cinder, if it was imbedded in the roadbed, does not give rise to a reasonable inference that its presence was the result of "negligent" conduct on the part of the defendant.

We must conclude that the cinder was present. It was one of obviously hundreds of thousands of cinders. To state that it is reasonable to conclude that it was allowed to be placed in the roadbed as a result of negligence is creating the obligation of insurer on the part of the defendant, which is contrary to the decisions of this court. (*Wilkerson* v. *McCarthy*, 336 U.S. 53). The rank speculation required to reach a conclusion of negligence should not be condoned.

Petitioner did not attempt to prove that the defendant's usual and customary manner in creating and repairing roadbeds exhibited a lack of care on its part. He obviously did not attempt to introduce evidence that in following its normal procedures if it had exercised care it would have known of the presence of this cinder. Petitioner's entire case is based on the mere fact that the cinder was present on the property of the defendant. Petitioner cites the case of *Sears, Roebuck & Co.* v. *Peterson*, 76 F. 2d 243, 246 (8 Cir. 1935). The reading of this case clearly indicates that the evidence affirmatively showed that the defendant established a standard of care in its procedure for removing twine from trees and then deviated from its standard in allowing a piece of twine to be present in the aisle where the plaintiff tripped on it. It violated its custom and practice. The fact that the defendant did not introduce any witness to contradict the circumstantial evidence introduced prompted the court to state that they must assume, in the absence of an explanation, that their testimony would not have contradicted the plaintiff's that

this twine was removed by their employees and thrown into the aisle where it was found at the time of the accident. This case clearly points out the necessity for proof of more than an alleged defect, that is, probative evidence that the defect was the result of failure to exercise reasonable care. Moreover, as stated in that case, page 245, the lower part of the aisle towards the floor was dark because the stands or counters obstructed the light, a fact with which the defendant was charged with notice and which of itself constitutes actionable negligence.

In the instant case the Court of Appeals in restating this fundamental principle of negligence law did not hold that negligence requires knowledge on the part of the defendant, but that in the absence of proof of actual knowledge, evidence must be presented upon which a jury can determine that the procedure utilized was careless or that there was a negligent failure to comply with its established method of procedure.

As the Court of Appeals stated in the instant case:

> "Furthermore, were we to hold that it was proper to permit the jury so to speculate, plaintiff still would not be entitled to recovery unless it was allowed also to speculate that it is negligence *per se* to allow such an object to become mixed in with the fine ballast used in improving its roadbed. Defendant's duty to plaintiff in this respect was to exercise the care of a reasonably prudent person, under the existing circumstances, to prohibit the introduction of a hazard into the roadbed where plaintiff was required to work. *Cf. Seaboard Air Line Ry. Co.* v. *Horton,* 233 U.S. 492; *Missouri Pacific R. Co.* v. *Zolliecoffer,* 191 S.W. 2d 587, 588 (Ark.). Not only is there no evidence that defendant violated that duty, but also, there is a total want of evidence as to what constitutes reasonable prudence under the proved circumstances."

Petitioner cannot reasonably contend that the Court of Appeals held that knowledge must be proven on the part of the defendant before it is liable for the actions of its agents or servants. He begs the question presented which was that while bound by the acts of ones agents to establish liability, there must be evidence that such acts are "negligent".

CONCLUSION

Respondent respectfully submits that the opinion of the Court of Appeals is fully justified by the record and is consistent with the decisions of this court; that this court should affirm the judgment of the Court of Appeals; or in the event that the judgment be reversed, that said cause be remanded to the Court of Appeals for consideration of the other assignments of error not heretofore considered by the Court of Appeals.

Respectfully submitted,

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